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Nos. 02-1238, 02-1386, 02-1405

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IN THE

Supreme Court of the United States

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI,
Petitioner,

AND

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Petitioners,

AND

SOUTHWESTERN BELL TELEPHONE, L.P.,
F/K/A SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, *ET AL.*,
Respondents.

On Writs of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR PETITIONER SOUTHWESTERN BELL TELEPHONE, L.P.

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September 8, 2003

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47 pp

QUESTION PRESENTED

Whether 47 U.S.C. § 253(a) establishes with the clarity required by *Gregory v. Ashcroft*, 501 U.S. 452 (1991), that Congress intended to intrude on the States' authority to control their subordinate political subdivisions by preempting state laws that prevent those subdivisions from offering certain telecommunications services.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The Missouri Municipal League; the Missouri Association of Municipal Utilities; City Utilities of Springfield; City of Sikeston Board of Utilities; Columbia Water & Light; and the American Public Power Association were petitioners both in the court of appeals and before the Federal Communications Commission ("FCC").

The FCC and the United States of America were respondents in the court of appeals.

Southwestern Bell Telephone, L.P., f/k/a Southwestern Bell Telephone Company, and the State of Missouri were intervenors in the court of appeals and participated in the proceedings before the FCC.

The City of O'Fallon, Missouri; the City of St. Louis, Missouri; GTE Service Corporation (and its affiliated telecommunications companies), MCI Telecommunications Corporation; the National Telephone Cooperative Association; UTC, The Telecommunications Association; and Missouri River Energy Services participated in the proceedings before the FCC.

The National Association of Telecommunications Officers and Advisors and the United Telecom Council participated as *amici curiae* in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Southwestern Bell Telephone, L.P., states the following:

Southwestern Bell Telephone, L.P., f/k/a Southwestern Bell Telephone Company, is a wholly owned subsidiary of SBC Communications Inc., a publicly held corporation. SBC Communications Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

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JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI,
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BRIEF FOR PETITIONER SOUTHWESTERN BELL TELEPHONE, L.P.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a)[1] is reported at 299 F.3d 949. The order of the Federal Commu-

[1] Except where otherwise indicated, references to "Pet. App. __" are to the appendix to the certiorari petition filed by Southwestern Bell Telephone, L.P. in No. 02-1405.

nications Commission (Pet. App. 12a-39a) is reported at 16 FCC Rcd 1157.

JURISDICTION

The opinion of the court of appeals was entered on August 14, 2002. On November 20, 2002, petitions for rehearing and rehearing en banc were denied. Pet. App. 40a. On February 10, 2003, Justice Thomas granted both Southwestern Bell Telephone, L.P. and the Federal Communications Commission and United States an extension of time within which to file certiorari petitions to and including March 20, 2003. *E.g.*, *id.* at 41a. On February 18, 2003, the State of Missouri filed a timely petition for certiorari in No. 02-1238. On March 20, 2003, the federal government and Southwestern Bell filed their petitions in No. 02-1386 and No. 02-1405, respectively. On June 23, 2003, all three petitions were granted. 123 S. Ct. 2605, 2606, 2607. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 253(a) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 253(a), provides:

> **(a) In general**
>
> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

All of section 253 is reproduced in the appendix to this brief, as are other relevant statutory provisions.

STATEMENT

1. The Federal Telecommunications Act of 1996. Before passage of the Telecommunications Act of 1996 ("1996 Act" or "Act"), local telephone service was generally thought to be a natural monopoly. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). States granted an exclusive franchise to a single carrier within a particular geographic area and regulated the exclusive franchisee, known as an

incumbent local exchange carrier ("ILEC"), as a public utility. *See id.* Among other things, States both required this single private carrier to provide "universal" service (that is, service at affordable rates to all who requested it) and closely supervised the exclusive franchisee's rates.

The 1996 Act transformed this exclusive-franchise model of local telecommunications by inducing other private competitors – long-distance companies such as AT&T and MCI, cable companies such as Comcast and Time Warner, and insurgent smaller competitors such as Birch and Cavalier – to deploy their own facilities and compete in the provision of local telecommunications. Noting that cable companies served 95% of American homes, Congress expressly concluded that "meaningful facilities-based competition is possible" in local telecommunications. S. Conf. Rep. No. 104-230, at 148 (1996). Congress therefore set out a framework for introducing full facilities-based competition by "accelerat[ing] rapidly *private sector* deployment of advanced telecommunications and information technologies and services." *Id.* at 113 (emphasis added). In sum, as this Court has explained, "[t]echnological advances . . . have made competition among multiple providers of local service seem possible, and Congress recently ended the longstanding regime of state-sanctioned monopolies." *AT&T*, 525 U.S. at 371.

Section 253 codifies Congress's termination of the prior regime. Section 253(a) provides that no state or local law "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

Sections 253(b) and (c) establish that, notwithstanding the general rule enunciated in subsection (a), Congress preserved significant state authority in the area of telecommunications. Section 253(b) thus provides that "[n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title [which addresses universal service], requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of

telecommunications services, and safeguard the rights of consumers." Section 253(c) similarly preserves States' authority to regulate rights-of-way.

Section 253(d) gives the FCC authority, after "notice and an opportunity for public comment," to "preempt the enforcement" of state or local statutes that are contrary to section 253(a) or (b) "to the extent necessary" to correct the "violation or inconsistency."

2. The Missouri Statute. Beginning before Congress passed the 1996 Act, some Missouri municipalities proposed methods through which they could become competitive providers of telecommunications services. But, as regulators of private telecommunications companies, these cities exercised or proposed to exercise their control over access to public rights-of-way and other governmental powers as a means to attain an unfair competitive advantage over private telecommunications providers.

For example, a proposed telecommunications franchise code for the City of St. Peters would have required any user of a public right-of-way, in the course of any work installing, repairing, replacing, or upgrading its own telecommunications facilities, to "install and dedicate to the City either a state of the art telecommunications compatible conduit . . . or at least four optic fibers, at the City's option, . . . [to] be used by the City for whatever purposes it may deem appropriate, including rental to the Franchisee or other applicants."[2] The City would have had these free facilities available to compete directly with the carrier that installed them or indirectly by leasing the facilities to a competitor. A similar ordinance was proposed in Kansas City.[3]

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[2] City of St. Peters Proposed Ordinance, Telecommunications Franchise Regulatory Code, § 25.8-5(a)(5) (July 11, 1995) (Respondents' C.A. App. 174-76).

[3] "As part of the total compensation paid to the City for the right of an operator to occupy public property and conduct its business, the City shall require as part of a franchise or license agreement access to the system for transmission of video, audio, data or other signals. . . . The City may interconnect other systems, including its own, using appropriate technology

Additionally, in the City of Springfield, it took one carrier more than seven months to negotiate a pole attachment agreement with the City of Springfield's municipally owned utility ("City Utilities"), apparently because City Utilities was simultaneously demanding that the carrier lease excess fiber capacity from the city.[4] And, after City Utilities underbid Southwestern Bell for a fiber-optics project, the City of Springfield's own mayor accused City Utilities of using its control of public utility poles to learn details, including the prices, of Southwestern Bell's proposal.[5]

After conducting hearings and reviewing the history of such efforts by municipalities to gain unfair competitive advantages through abuse of their regulatory authority, the Missouri General Assembly enacted H.B. 620 in August 1997. With limited exceptions, that statute prevents political subdivisions of the State from offering or providing telecommunications services. The pertinent statutory provision establishes that "[n]o political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section." Mo. Rev. Stat. § 392.410(7) (2001). Under Missouri law, a certificate of authority is required to provide intrastate interexchange

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that will not impair the operators' systems." Kansas City Draft Ordinance 960656, Chapter 25, Code of Ordinances – Communications Transmission Systems, § 25-71 (May 23, 1996) (Respondents' C.A. App. 178-79).

[4] *See* Deborah Barnes, *CU Restraining Trade, Firm Alleges*, Springfield News-Leader, Dec. 30, 1996, at 1B.

[5] Tamiya Kallaos & Ron Sylvester, *CU Abusing Power, Mayor Says*, Springfield News-Leader, Mar. 13, 1997, at 1A ("'[City Utilities] has been privy to all these negotiations,' [Mayor] Gannaway said. 'They knew every detail about it – what Bell was charging. All they had to do was undercut them on the price.'").

and local exchange telecommunications service. *See id.* § 392.410(2).[6]

3. The FCC Proceedings. In July 1998, the Missouri Municipal League as well as several other parties[7] (collectively, the "Missouri Municipals") filed a petition with the FCC asking that the Commission exercise its authority under section 253(d) to preempt H.B. 620. In particular, they requested that the FCC preempt that state statute to the extent that it prevented municipalities and municipally owned utilities from providing telecommunications services.

The FCC rejected those petitions and declined to preempt the Missouri statute. In reaching that conclusion, the FCC relied heavily on its prior determination in a case involving a legally indistinguishable question. In that earlier case, the FCC held that a Texas statute that prevented political subdivisions from providing telecommunications services was not preempted by section 253(a).[8] The FCC reasoned that

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[6] As originally passed, this statute was set to expire in August 2002, but last year the Missouri Assembly extended it through August 2007. The Assembly also amended the relevant statutory provision to allow some sales of telecommunications services and facilities to telecommunications providers; the basic proscription on political subdivisions providing telecommunications services nonetheless remains. *See* Mo. Rev. Stat. § 392.410(7) (2002). Accordingly, that amendment does not alter the legal question posed here.

[7] The other parties were the Missouri Association of Municipal Utilities, City Utilities of Springfield, Columbia Water & Light, and City of Sikeston Board of Utilities.

[8] The Texas statute prevented a "municipality" from obtaining a certificate necessary to provide telecommunications service or from "'offer[ing] for sale to the public, either directly or indirectly, . . . a service for which a certificate is required or any non-switched telecommunications service to be used to provide connections between customers' premises within the exchange or between a customer's premises and a long distance provider serving the exchange.'" Memorandum Opinion and Order, *The Public Utility Commission of Texas, et al., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd 3460, 3540-41, ¶ 173 (1997) ("*Texas Preemption Order*") (quoting Texas Pub. Util. Reg. Act of 1995 § 3.251(d), Tex. Rev. Civ. Stat. Ann. art. 1446c-0 (West Supp. 1996)).

section 253(a) could preempt such state laws only if it spoke with the clarity required by the plain-statement rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991). *Gregory* applied because Texas's determination of what powers to delegate to its political subdivisions was a "fundamental state decision[]" with which "'Congress does not readily interfere,' absent a clear indication of intent." *Texas Preemption Order*, 13 FCC Rcd at 3545-46, ¶ 181 (quoting *Gregory*, 501 U.S. at 461). In concluding that the *Gregory* plain-statement rule had to be satisfied, the FCC's *Texas Preemption Order* expressly followed the long series of cases from this Court establishing that political subdivisions are "creatures . . . of the state" and "'subordinate governmental instrumentalities'" whose powers "'rest[] in the absolute discretion of the State.'" *Id.* at 3545, ¶¶ 180, 181 (citing *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 215 (1984), and quoting *Sailors v. Board of Educ.*, 387 U.S. 105, 107-08 (1967)) (ellipsis in original; internal quotation marks omitted).

The FCC found no plain statement that would satisfy the *Gregory* rule. The FCC concluded that section 253(a) "appears to prohibit restrictions on market entry that apply to independent entities *subject to state regulation*, not to political subdivisions of the state itself." *Id.* at 3547, ¶ 184 (emphasis added). The FCC further explained that a contrary result would have extreme and anomalous consequences: "If we were to construe the term 'entity' in this context to include municipalities, which . . . are mere 'instrumentalities' of the state, section 253 effectively would prevent states from prohibiting their political subdivisions from providing telecommunications services, despite the fact that states could limit the authority of their political subdivisions in all other respects." *Id.* Put differently, "preempting the enforcement of [the Texas statute] would insert the Commission into the relationship between the state of Texas and its political subdivisions in a manner that was not intended by section 253." *Id.* at 3544, ¶ 179.

On review of the *Texas Preemption Order*, a unanimous panel of the D.C. Circuit (Randolph, J., joined by Rogers and Tatel, JJ.) affirmed the FCC's judgment. *See City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999). Like the FCC, the D.C. Circuit determined that the *Gregory* plain-statement rule applied. *See id.* at 52. And, again like the FCC, the court concluded that the *Gregory* rule was not satisfied because section 253(a) did not speak with the "unmistakable clarity" necessary to conclude that Congress intended to "alter[] the State's governmental structure." *Id.* The Court explained that Congress left the term "entity" "undefined in the Telecommunications Act." *Id.* In the absence of such a definition, it was "linguistically possible" that a political subdivision could be considered an "entity" covered by section 253(a), but that result was not compelled by the text. *See id.* at 52-53. In sum, there was no "textual evidence" demonstrating that "Congress deliberated over the effect" this intrusion on state sovereignty "would have on State-local government relationships" and that, despite that consequence, Congress "meant to authorize municipalities, otherwise barred by State law, to enter the telecommunications business." *Id.* at 53.

In the decision at issue here, the FCC found the *Texas Preemption Order* and its affirmance in *City of Abilene* to be controlling. The FCC concluded that it was "presented . . . with the same issue that [it] addressed in the *Texas Preemption Order*." Pet. App. 23a (¶ 12). Accordingly, as it had in its prior order, the FCC determined that section 253(a) did not clearly establish Congress's intent to deprive States of the right to control subordinate state governmental bodies. In reaching that result, the FCC noted the D.C. Circuit's conclusion that the language of section 253(a) is "not clear enough to demonstrate, pursuant to *Gregory*, that Congress intended to intrude upon state-local government relationships." *Id.* at 24a (¶ 14). In accord with that holding and its own prior determination, the FCC again held that "the term 'any entity' in section 253(a) of the Act was not intended to include political subdivisions of the state, but rather appears to prohibit

restrictions on market entry that apply to independent entities subject to state regulation." *Id.* at 19a (¶ 9).

Three FCC commissioners filed statements agreeing that the correct legal result was that the Missouri statute had not been preempted, but voicing the opinion that, as a policy matter, the competitive issues raised by municipal provision of telecommunications should be dealt with in other ways. *See id.* at 36a-37a, 38a-39a.

4. The Eighth Circuit Proceedings. The Missouri Municipals filed a petition for review of the FCC's judgment in the Eighth Circuit, which was the only court of appeals other than the D.C. Circuit with venue over their petition. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2343 (establishing jurisdiction to review FCC orders in the D.C. Circuit as well as in the circuit in which the petitioner resides).

In granting the petition for review, the Eighth Circuit expressly disagreed with the D.C. Circuit's conclusion in *City of Abilene* and vacated the order of the FCC. In parting ways with the D.C. Circuit, however, the Eighth Circuit did *not* dispute that the *Gregory* plain-statement rule applied. *See* Pet. App. 5a-6a. Instead, unlike both the FCC and the D.C. Circuit, the Eighth Circuit found that section 253(a) satisfied the *Gregory* standard. In analyzing the word "entity," the Eighth Circuit cited a 1999 edition of a legal dictionary to demonstrate that "[t]here is no doubt" that the "'ordinary meaning'" of that word includes "municipalities." *Id.* at 7a. The Eighth Circuit further found Congress's use of the word "any" to be particularly important evidence that Congress intended to preempt state laws limiting political subdivisions' ability to provide telecommunications services. *See id.* ("Congress's use of 'any' to modify 'entity' signifies its intention to include within the statute all things that could be considered as entities."). In this regard, the Eighth Circuit highlighted this Court's decision in *Salinas v. United States*, 522 U.S. 52 (1997), where the Court found that the phrase "any business, transaction, or series of transactions" in the federal bribery statute is sufficiently clear to cover bribery of

state officials holding a federal prisoner. *See* Pet. App. 8a-9a.

SUMMARY OF ARGUMENT

This is a straightforward case. Under *Gregory v. Ashcroft* and its progeny, section 253(a) can be interpreted to strip the States of the right to decide whether their political subdivisions offer telecommunications only if the Court were to determine that section 253(a) is unmistakably clear in compelling that interpretation. That standard is not remotely satisfied. Section 253(a) is at best ambiguous as to whether Congress intended the extreme result of freeing political subdivisions of the constraints placed upon them by state law. Accordingly, the judgment of the Eighth Circuit should be reversed.

A. The *Gregory* plain-statement rule applies to this case. Under the Court's precedents, including its recent decision in *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002), a State's ability to control the actions of its political subdivisions is central to state self-government. Respondents' reading of section 253(a) would deny States an aspect of that core attribute of their sovereignty. It thus implicates *Gregory*, as the FCC, the D.C. Circuit, and even the Eighth Circuit have properly concluded.

B. Section 253(a) does not speak with the clarity required to clear the *Gregory* hurdle. Congress passed the 1996 Act, and section 253(a) in particular, to overturn state exclusive-franchise laws and thus to free private competitors potentially subject to state regulation from the state and local laws that would otherwise preclude their entry into local telecommunications markets. That step itself transformed traditional local telecommunications regulation. However, section 253(a) does not demonstrate – much less demonstrate unmistakably – that Congress went much further and forced the States to allow their own instrumentalities to offer telecommunications services even if the State has decided against that course as a matter of policy.

The text of the statute supports that conclusion for multiple reasons. As an initial matter, because section 253(a) bars

"State *or* local" statutes and regulations that prohibit "any entity" from offering telecommunications services, if the statute were read as respondents suggest, that would mean that a local legislative body (such as a town council) itself could not bar local executive officials from offering telecommunications. Moreover, if the 1996 Act were read this way, that would mean that, as a matter of federal law, States could abolish municipalities entirely, but lack the much lesser power to prevent them from offering telecommunications. Those are absurd results that Congress could not have intended. Additionally, the statutory context – particularly, sections 253(b) and (c) – suggests that Congress intended to *preserve*, not negate, important state public policies. As the D.C. Circuit properly understood, it would be extremely odd for Congress to "set aside [such] a large regulatory territory for State authority" in subsections (b) and (c) yet override the States' core authority to control their political subdivisions in subsection (a). *City of Abilene*, 164 F.3d at 53. Congress would need to speak with much greater clarity than it has if it desired to mandate that bizarre dichotomy.

The use of the term "entity" similarly fails to demonstrate that Congress plainly intended to force States to permit their political subdivisions to offer telecommunications. The word "entity" normally connotes a thing with "a distinct and independent existence" – a criterion that is not met by political subdivisions that are wholly *dependent* on the State for their continued existence and their ability to exercise powers of any kind. Even more to the point, precisely because the exact contours of the word "entity" and its application to public bodies are unclear, Congress frequently defines that word, and it has done so in ways that both include *and* exclude public instrumentalities. Congress provided no such definition here. Moreover, the United States Code refers at least 600 times to forms of the phrases "public entity" and "government entity," demonstrating yet again that Congress well knows how to include such bodies within a statute's ambit. Again, Congress did no such thing here.

The use of the word "any" to modify "entity" does not override all these other indications that Congress did not plainly intend to reach the result that respondents urge. As this Court explained in *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002), a closely analogous *Gregory* case involving the phrase "any claim," this is at most "general language" that does not demonstrate the requisite "specific or unequivocal intent" to preempt the States' historic prerogative to control the actions of their subdivisions. *Id.* at 544-45.

In the end, as respondents themselves have acknowledged, this case turns on whether section 253(a) should be "interpreted *broadly*." Cert. Opp. i (question presented) (emphasis added). Under *Gregory*, however, if a federal statute is subject to a "broad" and a "narrow" construction, it must be read narrowly so as to avoid intruding on traditional state prerogatives. Thus, even assuming that respondents' construction of section 253(a) were a plausible one, it is not mandated with the clarity required by this Court's precedents, and should thus be rejected.

ARGUMENT

SECTION 253(a) DOES NOT PREEMPT STATES' DEEPLY ROOTED AUTHORITY TO LIMIT THE ACTIVITIES OF POLITICAL SUBDIVISIONS

A. Section 253(a) May Be Interpreted To Prevent States from Controlling the Actions of Political Subdivisions Only if Unmistakably Clear Language in the Statute Itself Compels that Conclusion

Under this Court's precedents, respondents bear a heavy burden in arguing that Congress has intervened in the relationship between the State of Missouri and its political subdivisions and barred the State from controlling the activities of those political subdivisions.

1. Even assuming that Congress has the *power* to overturn state laws limiting the authority of political subdivisions to provide telecommunications, Congress should not be "lightly" assumed to have done so. *See Gregory v. Ashcroft*,

501 U.S. 452, 460 (1991). Rather, if Congress intends to alter the constitutional balance between the States and the federal government, it must make its intention to do so "'*unmistakably clear in the language of the statute.*'" *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 543 (2002) (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)) (emphasis added); *Gregory*, 501 U.S. at 460; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). The relevant rule is that, where Congress "legislates in 'traditionally sensitive areas' that 'affect the federal balance,'" it must provide a "clear statement" demonstrating that intent in the text of the statute. *Raygor*, 534 U.S. at 543-44 (quoting *Will*, 491 U.S. at 65 (quoting in turn *United States v. Bass*, 404 U.S. 336, 349 (1971))) (internal quotation marks and alteration omitted).

This established interpretive principle is grounded in the bedrock values of our constitutional system. The federal structure of our government "preserves to the people numerous advantages" – including decentralized government responsive to the needs of diverse communities, increased opportunity for innovation and experimentation, and a check on abuses of government power. *Gregory*, 501 U.S. at 458-59. Thus, although the Supremacy Clause generally empowers the national government to alter the "delicate balance" between federal and state authority, *id.* at 460, the Court proceeds from the premise that Congress interferes with the "substantial sovereign powers" retained by the States only after giving the matter careful consideration and squarely addressing this sensitive issue in the text of the statute, *id.* at 461.

2. There can be no serious dispute that this requirement of unmistakably clear language applies in this context.

States traditionally maintain unlimited authority in determining the "number, nature and duration" of the powers conferred on their political subdivisions. *Sailors v. Board of Educ.*, 387 U.S. 105, 107-08 (1967) (internal quotation marks omitted). As the Court has explained, "[t]he principle is well settled that local governmental units are created as conven-

ient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991) (internal quotation marks and alterations omitted); *see Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (States enjoy "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them").[9] As Justice Frankfurter explained, "[i]t would make the deepest inroads upon our federal system for [a federal court] now to hold that it can determine the appropriate distribution of powers and their delegation within the forty-eight States." *Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring in the result); *see also Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 629-30 (1819) (in delineating the powers of its political subdivisions, a State is "unrestrained by any limitation of its power imposed by the constitution of the United States").

The Court reiterated this key point just last year in *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002). In that case, the Court held that the Interstate Commerce Act did not preempt a State's authority to delegate to political subdivisions the power to regulate the safety of certain motor carriers. *See id.* at 435-38. In concluding that Congress did not intend to interfere with such decisions by the State, the Court once again stressed the "essential observation" that "'local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in [the State's] absolute discretion.'" *Id.* at 437 (quoting *Mortier*, *supra*). "Whether and how to use that discretion is a question central to state self-government." *Id.*

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[9] Missouri law accords with this Court's understanding of the relationship between a State and its political subdivisions. *See Century 21-Mabel O. Pettus, Inc. v. City of Jennings*, 700 S.W.2d 809, 811 (Mo. 1985) (under Missouri law, "[a] municipality derives its governmental powers from the state and exercises generally only such governmental functions as are expressly and impliedly granted it by the state").

Under *City of Columbus* and the decisions on which it is based, interpreting section 253(a) in the manner suggested by the Missouri Municipals would strike at the heart of the sovereignty of the States. *See Gregory*, 501 U.S. at 460. Accordingly, the Court's precedents establish that this is precisely the kind of case to which the *Gregory* rule most properly applies.

Because the issue is so clear, there has in fact been wide agreement on the applicability of *Gregory* to the issue presented here. Both the Eighth Circuit and the D.C. Circuit expressly concluded that *Gregory* applies. *See* Pet. App. 6a ("[T]he *Gregory* rule requires us to determine whether the statutory language plainly requires preemption."); *City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999) (concluding that, because the relationship between a State and its subdivisions "strikes near the heart of State sovereignty," "§ 253(a) must be construed in compliance with the precepts laid down in *Gregory*"). The FCC has likewise determined that *Gregory* applies to the issue presented here. *See Texas Preemption Order*, 13 FCC Rcd at 3545, ¶ 181. And even the Missouri Municipals did not dispute in the Eighth Circuit that, for the Missouri statute to be preempted, section 253(a) would have to satisfy the *Gregory* standard. *See* Missouri Municipals C.A. Opening Br. at 30 (8th Cir. filed Mar. 26, 2001).[10]

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[10] Although the Court need go no further than *Gregory* to determine the proper rule of statutory construction here, the extreme result championed by respondents also implicates a second plain-statement rule: the rule that a statute should not be read to create a significant constitutional issue unless that result was Congress's clear intent. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

If section 253(a) is read as the Missouri Municipals claim, then the federal government has effectively conscripted the governments of the States into assisting with Congress's plan to inject competition into local telecommunications markets. Such an interpretation implicates the Tenth Amendment principle that Congress may not "commandeer" the governments of the several States to act as instruments of congressional will. *See New York v. United States*, 505 U.S. 144, 161 (1992) (internal quota-

B. Section 253(a) Does Not Establish with Unmistakable Clarity Congress's Intent To Preempt States' Authority over Their Political Subdivisions

Section 253(a) does not demonstrate with anything approaching a plain statement that Congress intended to preempt the States' long-established authority to control the actions of their subdivisions.

1. Before 1996, many state and local laws banned competition of any kind in all or part of local telecommunications markets.[11] As a matter of law, private companies that might want to compete could not do so, no matter how efficient they might be or what benefits they might bring to consumers. Regulators treated the local telecommunications market as a "natural monopoly" and granted "exclusive franchise[s] in each local service area," thus outlawing competition. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999).

A core purpose of the 1996 Act was, in this Court's words, to "end[] the longstanding regime of state-sanctioned monopolies." *Id.* Congress recognized that cable companies had facilities covering 95% of American homes and that they and other new competitors – including wireless providers, long-distance companies, and fledgling wireline companies –

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tion marks omitted); *Printz v. United States*, 521 U.S. 898, 928 (1997). If States cannot stop local governments from entering the telecommunications business, then the 1996 Act serves to compel States to further the federal regulatory plan. *See Printz*, 521 U.S. at 928 (Congress may not require officials of States and state subdivisions to take actions to enforce federal regime); *Atascadero*, 473 U.S. at 238 n.2 ("The Constitution never would have been ratified if the States . . . were to be stripped of their sovereign authority except as expressly provided by the Constitution itself.").

[11] *See* NARUC, *Telecommunications Competition 1997: A State-By-State Report On Pro-Competitive Measures In Intrastate Telecommunications*, at Table 1 (Sept. 1997); Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 14171, 14174, ¶ 5 (1996) ("[A]s of 1996, more than 30 states had not adopted laws or regulations providing for local competition. Many of those states that had not adopted laws or regulations permitting local competition had provisions that specifically limited competitive entry into local telecommunications markets.").

could make "meaningful facilities-based competition . . . possible" in local telecommunications. S. Conf. Rep. No. 104-230, at 148 (1996). Congress accordingly decided to override state laws that banned such companies from entering these markets. In so doing, it opened the door for "accelerate[d] . . . *private sector* deployment of advanced telecommunications and information technologies and services." *Id.* at 113 (Joint Explanatory Statement of the Committee of Conference) (emphasis added).

Section 253(a) makes possible this transformation of local telecommunications markets from state-sanctioned monopoly to private competition. By expressly preempting "State or local statute[s] or regulation[s], or other State or local legal requirement[s]," that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," Congress ensured that States and localities could not enforce exclusive franchise laws or other requirements that effectively precluded entry by cable companies, long-distance companies, and other private parties that would normally be subject to state and local regulation.

Thus, what is clear from section 253(a) is that it precludes state laws that insulate incumbent local telecommunications providers from competition from the other kinds of private providers that Congress believed could now technologically compete with the incumbents. What is *not* clear from section 253(a) – and, in fact, seems quite unlikely – is that Congress intended to go well beyond that and required States to permit their political subdivisions to offer telecommunications service even if States had determined that to be bad public policy.

At bottom, it is the statutory text that demonstrates that Congress did not clearly intend to overturn the latter class of state laws. Before parsing that text in detail, however, it is worth noting that mandating that States permit their subdivisions to provide telecommunications services would have involved distinct – and thorny – questions not only of federalism, but also of telecommunications policy. As the FCC

has explained, "municipal entry into telecommunications could raise issues regarding taxpayer protection from economic risks of entry, as well as questions concerning possible regulatory bias when a municipality acts as both a regulator and a competitor." Pet. App. 22a (¶ 11). Among many other potential issues, local governments may use their control over rights-of-way to obtain unfair competitive advantages by, for instance, demanding in-kind benefits in exchange for use of rights-of-way. *See, e.g., supra* pp. 4-5. They may also obtain unfair advantages by subsidizing their commercial ventures with revenues from other sources and may use their regulatory authority to disadvantage potential competitors. *See generally* Brief of USTA/Verizon as *Amicus Curiae* in Support of Cert. at 7-13, Nos. 02-1238 *et al.* (discussing policy issues raised by municipal entry); Nebraska Cable Communications Ass'n Brief *Amicus Curiae* in Support of Cert. at 3-7, Nos. 02-1238 *et al.* (elaborating upon access discrimination and cross-subsidization problems raised by municipal entry into telecommunications).

Moreover, when Congress passed the 1996 Act, it had little reason to tackle those distinct and difficult policy issues. At that time, there were very few municipalities offering telecommunications services. *See* John M. Eger & Arthur M. Becker, *Telecommunications and Municipal Utilities: Cooperation and Competition in the New Economy* at 18, Special Report Prepared for the American Public Power Association (Sept. 2000) (as of 1997, 65 municipal utilities in the entire country offered some form of telecommunications service). This was, accordingly, not a significant issue upon which Congress was required to focus its deliberations or to provide a single one-size-fits-all solution that would short-circuit state experimentation. It would be particularly strange for Congress to reach out and preempt state policy determinations on an issue that, at the time, was not of significant national concern.

2. Consistent with that context, the text of section 253 does not show unequivocally that Congress deliberated about the distinct issues raised by government provision of tele-

communications services and decided to alter the federal-state balance by overriding state laws that banned that practice.

As an initial matter, Congress's statement that it was preempting "State or local statute[s] or regulation[s], or other State or local legal requirement[s]," that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," is most naturally read to lift state and local restrictions on companies that would otherwise be subject to state regulation, not to excuse the regulators themselves – the State and its subdivisions – from applicable state law. As the FCC put the point, section 253(a) "appears to prohibit restrictions on market entry that apply to independent entities *subject to state regulation*, not to political subdivisions of the state itself." *Texas Preemption Order*, 13 FCC Rcd at 3547, ¶ 184.

Indeed, if section 253(a) were read as the Missouri Municipals claim, that would lead to absurd results that Congress could not have intended. Under that interpretation, as a matter of federal law the State of Missouri would indisputably possess absolute discretion to abolish municipalities entirely, *see, e.g.*, *Mortier*, 501 U.S. at 607-08, but it would be barred from taking the much lesser step of preventing them from providing telecommunications services. It is difficult to imagine that Congress intended such a result.

Equally significant, because section 253(a) preempts "State" or "local" regulations, it not only would prevent a *State* from controlling its subdivisions in this one discrete area, but also would prevent a *town council* from determining that it was not in the town's interest to offer telecommunications services. So, if the mayor of a town wanted to offer such services despite a contrary ordinance passed by the council, the mayor could claim that, because of section 253(a), he was not bound by the council's determination. Even aside from the *Gregory* canon, the Court should not adopt such an absurd reading of the statute unless it were extraordinarily clear that this was Congress's intent. *See, e.g.*,

United States v. X-Citement Video, Inc., 513 U.S. 64, 69 (1994).

Moreover, as with all statutory provisions, the language of section 253(a) must be read in context. *See, e.g., Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) (when interpreting statutes, the Court does not focus on "a single sentence or member of a sentence" but on "the provisions of the whole law, and . . . its object and policy") (internal quotation marks omitted); *Jones v. United States*, 527 U.S. 373, 389 (1999). Here, the key statutory context is provided by the subsequent subsections, through which Congress expressly preserved States' authority under state law to pursue important policies of local concern, including universal service and consumer protection, even if those policies might be inconsistent with section 253(a). *See, e.g.*, 47 U.S.C. § 253(b) ("Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title [relating to universal service], requirements necessary to preserve and advance universal service, protect the public safety and welfare, . . . and safeguard the rights of consumers."). As the D.C. Circuit explained, these two provisions "set aside a large regulatory territory for State authority." *City of Abilene*, 164 F.3d at 53. And, as that Court understood, *see id.*, it would be quite peculiar for Congress to be so expressly solicitous of these state-law policies in sections 253(b) and (c), yet at the same time preempt a state judgment that the State itself and its instrumentalities should not enter the telecommunications marketplace. At the least, if Congress did intend to create such a dichotomy, one would expect – and *Gregory* requires – significantly more clarity on this point in the text of section 253(a).[12]

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[12] In the proceedings below, respondents argued that the "plain statement" requirement could be found in the legislative history of section 253(a). That assertion is without foundation. *Gregory* requires a "plain statement" in the text itself – "it must be plain to anyone *reading the Act* that it covers judges." 501 U.S. at 467 (emphasis added). The Court has said the same thing in the analogous Eleventh Amendment context. *See Atascadero*, 473 U.S. at 242 (Congress may abrogate state immunity

Congress's use of the word "entity" – even viewed outside of this statutory context – also demonstrates that section 253(a) is at best ambiguous on this point. An "entity" is defined as "a thing with distinct and independent existence,"[13] "[s]omething that exists as a particular and discrete unit,"[14] or "[s]omething that exists independently."[15] As the D.C. Circuit has explained, an "entity" may "include a natural person, a corporation, a partnership, a limited liability company, a limited liability partnership, a trust, an estate, [or] an association." *City of Abilene*, 164 F.3d at 52. Accordingly, consistent with the FCC's analysis, the term "entity" as used in section 253(a) plainly would encompass all forms of private enterprise that might be regulated by the State.

By contrast, and as noted earlier, settled law establishes that political subdivisions are not "distinct" and "independent" from the State; to the contrary, they are part of the State and dependent upon it for any powers they may be authorized to wield. They are thus not *clearly* encompassed within the "entities" covered by section 253(a). *See also Sailors*, 387 U.S. at 107 ("Political subdivisions of States – counties, cities or whatever – never were and never have been considered as sovereign entities.") (internal quotation marks omitted); *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002) (finding the word "entity" to be ambiguous in 47 U.S.C. § 224; "[t]he most that can be said is that § 224(e)(2) is unclear on whether utilities or municipalities count as 'attaching entities'"); *Alarm Indus. Communications Comm. v. FCC*, 131 F.3d 1066, 1068-72 (D.C. Cir. 1997) (finding the word "entity" to be ambiguous in 47 U.S.C § 275(a)(2)). This does not mean that it is not "linguistically possible," *City of Abilene*, 164 F.3d at 52, that Congress intended the term "entity" to cover political subdivisions, but the disposi-

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"only by making its intention unmistakably clear in the language of the statute").

[13] *New Oxford American Dictionary* 568 (2001).

[14] *Webster's II New College Dictionary* 376 (1999).

[15] *The Concise American Heritage Dictionary* 236 (rev. ed. 1987).

tive point is that Congress's use of that word hardly provides the necessary unequivocal evidence that Congress affirmatively intended to preempt state control over political subdivisions.

That conclusion is fortified significantly by the fact that Congress plainly understands that the term "entity" is ambiguous standing alone. Congress thus frequently defines that term – which it did *not* do in section 253 – and has done so in ways that both include *and* exclude political subdivisions. *Compare, e.g.*, 2 U.S.C. § 1602(14) ("The term 'person or entity' means any individual, corporation, company, foundation, . . . or State or local government.") *and* 42 U.S.C. § 285a-9(a)(4) ("the term 'entity' means any . . . agency of any State or local government") *with* 21 U.S.C. § 1907(1) ("The term 'entity' means a partnership, joint venture, association, corporation, organization, network, group, or subgroup, or any form of business collaboration.") *and* 26 U.S.C. § 269B(c)(1) ("The term 'entity' means any corporation, partnership, trust, association, estate, or other form of carrying on a business or activity.").[16]

Nor is that the only way that Congress has elsewhere addressed the lack of unmistakable clarity in the application of the word "entity" to governmental bodies. On more than *600* other occasions in the United States Code, Congress has used forms of the phrase "government entity" or "public entity" to encompass governmental actors.[17] Congress could easily

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[16] *See also* 26 U.S.C. § 302(c)(2)(C)(ii)(I) ("the term 'entity' means a partnership, estate, trust, or corporation"); 47 U.S.C. § 274(i)(6) ("The term 'entity' means any organization, and includes corporations, partnerships, sole proprietorships, associations, and joint ventures.").

[17] *E.g., Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998) (Americans with Disabilities Act of 1990 is not ambiguous as to term "public entity," which includes state prisons); 15 U.S.C. § 3802(c) ("the term 'public entities' means any unit or units of State and/or local governments"); 15 U.S.C. § 6602(3) ("[t]he term 'government entity' means an agency, instrumentality, or other entity of Federal, State, or local government"); 42 U.S.C. § 290ff(a)(2) ("the term 'public entity' means any State, any political subdivision of a State, and any Indian tribe or tribal organization"). If one runs the following search in Westlaw's

have included a similar clarification here as well if it had intended to resolve the issue whether States could prevent their subdivisions from offering telecommunications services.

Furthermore, elsewhere in the Communications Act of 1934 itself, Congress defined the term "noncommercial telecommunications entity" to include bodies that, among other things, are "owned and operated by a State, a political or special purpose subdivision of a State, a public agency, or a nonprofit private foundation, corporation, or association." 47 U.S.C. § 397(7). Similarly, Congress uses variants of the phrase "local government" throughout the Communications Act[18] and could easily have specified that "entities" included "local governments" if it had intended to resolve the question at issue here.

In sum, Congress well understands that the term "entity" is ambiguous as to its application to public bodies, and, in other instances where it seeks to include such bodies within the meaning of the term, has either included a specific definition or used a more precise phrase. The fact that Congress did not do so here provides further evidence that section 253(a) is not unmistakably clear in compelling the result urged by respondents. *See, e.g.*, *Department of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 132 (2002) (comparison of federal statute showing that Congress "knows exactly how" to provide an innocent-owner defense reinforces the conclusion that no such defense exists in another statute that does not contain the similarly express language); *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996) (Congress "demonstrated in [the Comprehensive Environmental Response, Compensation, and Liability Act of 1980] that it knew how to provide for the recovery of cleanup costs, and that the language used to define the remedies under [the

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USC database, 656 separate documents are retrieved: (government! w/2 entity or entities) or (public! w/2 entity or entities).

[18] *See* 47 U.S.C. §§ 158(d)(1), 221(b), 223(f)(2), 302a(f), 305 note (2-411), 309(j)(2)(A), 332(c)(3)(A), 332(c)(7)(A)-(B), 337(f)(1)(B)(i), 392(a)(1), 394(i)(2), 396(k)(2)(A), 543(a)(1), 902(b)(2)(N), 922(2).

Resource Conservation and Recovery Act of 1976] does not provide that remedy"); *McFarland v. Scott*, 512 U.S. 849, 861-62 (1994) (O'Connor, J., concurring in the judgment in part and dissenting in part) ("Congress knows how to give courts the broad authority to stay proceedings of the sort urged by petitioner. . . . The absence of such explicit authority in the habeas statute is evidence that Congress did not intend federal courts to enter stays of execution in the absence of some showing on the merits.").

3. The Eighth Circuit did not come to grips with those key facts in concluding that the "ordinary meaning" of "entity" clearly encompassed political subdivisions. *See* Pet. App. 7a (internal quotation marks omitted). Instead, as evidence for that point, it cited a definition given in a 1999 edition of one legal dictionary (*Black's Law Dictionary*). *See id.* That evidence hardly establishes that the word "entity" conveys an unmistakable intent to preempt state laws governing the activities of political subdivisions. As noted, the question before the Court is not whether "entity" could conceivably bear the meaning the Eighth Circuit ascribed to it; rather, it is whether the statute *necessarily* has that meaning. *Gregory*, 501 U.S. at 464 ("[W]e must be absolutely certain that Congress intended such an exercise. To give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which [we have] relied to protect states' interests.") (internal quotation marks and citation omitted). Given that Congress specifically defines "entity" to include public bodies when that is its intent, the absurd consequences that would result from the conclusion championed by respondents, the statutory context, and the other possible definitions of the term, the fact that one dictionary indicates that "entity" can include political subdivisions hardly creates the unmistakable clarity that would be necessary to affirm the Eighth Circuit.

Nor is it an answer to these other arguments to claim, as the Eighth Circuit did, that Congress chose to modify "entity" with "any" in section 253(a). *See* Pet. App. 7a-9a. On the contrary, this Court's case law compels the conclusion

that, without more specific evidence of the kind lacking in section 253(a), the word "any" by itself does not demonstrate sufficiently clearly that Congress deliberated about and intended to resolve the kind of core federalism issues involved in this case.

In particular, the Court's recent decision in *Raygor* is dispositive on this point. *Raygor* involved the scope of 28 U.S.C. § 1367(d), which provides for the tolling of a state statute of limitations period "for *any* claim" (emphasis added) that is ultimately dismissed by a federal court that had been filed under the court's supplemental jurisdiction. The question was whether section 1367(d) applied even where the claim was dismissed on Eleventh Amendment grounds. After holding that the *Gregory* rule applied to that interpretive issue, the Court concluded that the statute's general reference to "*any* claim" was insufficient to constitute a plain statement under *Gregory*. It explained:

> [W]e have previously found similarly general language insufficient to satisfy clear statement requirements. For example, we have held that a statute providing civil remedies for violations committed by "'*any* recipient of Federal assistance'" was "not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment" even when it was undisputed that a state defendant was a recipient of federal aid. Instead, we held that "when Congress chooses to subject the States to federal jurisdiction, it must do so specifically." Likewise, § 1367(d) reflects no specific or unequivocal intent to toll the statute of limitations for claims asserted against nonconsenting States . . . .

534 U.S. at 544-45 (quoting *Atascadero*, 473 U.S. at 245-46) (citations and internal brackets omitted). Thus, the Court reasoned, "although § 1367(d) may not clearly exclude tolling for claims against nonconsenting States dismissed on Eleventh Amendment grounds, we are looking for a clear statement of what the rule *includes*, not a clear statement of

what it *excludes*." *Id.* at 546. On that basis, the Court concluded that the plain-statement rule was not satisfied. *See id.*

The same analysis applies here, and it undermines the Eighth Circuit's reliance on the modifier "any" to demonstrate unmistakable clarity. Even aside from the other contextual evidence discussed above, in this case, as in *Raygor*, the phrase "any entity" is at most "general language" that does not demonstrate a "specific or unequivocal intent" to address the issue presented here. Under such circumstances, *Raygor* teaches that the *Gregory* standard has not been satisfied.

Contrary to the Eighth Circuit's analysis, the Court's decision in *Salinas v. United States*, 522 U.S. 52 (1997), does not undermine any of these points – in fact, it strongly reinforces the conclusion reached by the FCC and the D.C. Circuit. That case involved the federal bribery statute, which refers to "any business, transaction, or series of transactions." *See id.* at 56. The question presented was whether that language encompasses the receipt of a bribe by a local official in exchange for allowing improper visits to a federal prisoner, a payment that did not affect federal funds. The Court concluded that the statute is sufficiently broad to reach that conduct and that it would "press statutory construction to the point of disingenuous evasion" to reach any other conclusion. *Id.* at 60 (internal quotation marks omitted).

Crucially, however, the Court did not rely solely on the fact that the statute used the word "any" in analyzing the relevant statute. Instead, as in *Raygor*, it looked at the statute as a whole, as well as its history, to determine that the language at issue was sufficiently "unambiguous" in covering the transaction at issue. For instance, the Court stressed that related language in the statute referred broadly to covering all "'organization[s], government[s], or agenc[ies]'" receiving funds under the federal program. *Id.* at 57. The Court further noted that, prior to the enactment of the statute at issue in *Salinas*, federal courts had split on whether federal bribery law could be interpreted to apply to "state and local employees." *Id.* at 58. Congress thus enacted that law precisely to

resolve this issue. *See id.* at 59 ("Acceptance of Salinas' suggestion . . . would run contrary to the statutory expansion that redressed the negative effects of the [narrow construction previously adopted by some courts]."). The Court relied on both this "chronology" and on all the relevant "statutory language" in reaching its conclusion, not on the bare use of the word "any" wrenched from all context. *Id.* at 58.

For the reasons discussed above, both the statutory language, taken as a whole, and the context of the 1996 Act's enactment demonstrate that section 253(a) is at best ambiguous on the issue presented here. Accordingly, *Salinas*, like *Raygor*, *Gregory*, and all the other prior relevant decisions of this Court, in fact supports the position of the FCC and the D.C. Circuit. It does not support the Eighth Circuit's judgment.

Finally, it is worth noting in this regard that the potential encroachment on state sovereignty is markedly greater in this case than in *Salinas*. There is little state "policy" that is harmed by extending federal bribery statutes to state employees who supervise federal prisoners. Here, by contrast, the preemptive reach of section 253(a) implicates an authority that lies at "the heart of representative government," *Gregory*, 501 U.S. at 462 (internal quotation marks omitted) – the State's ability to decide what kinds of services should be provided by its subdivisions. Section 253(a) does not approach the kind of clear statement required to conclude that Congress intended to interfere with a State's judgment on such a core matter of state sovereignty.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX
Statutory Provisions

47 U.S.C. § 253. Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply –

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

Missouri Revised Statutes § 392.410 (2002)

Certificate of public convenience and necessity required, exception – certificate of interexchange service authority, required when – duration of certificates – temporary certificates, issued when – political subdivisions restricted from providing certain telecommunications services or facilities, expiration date.

392.410. 1. A telecommunications company not possessing a certificate of public convenience and necessity from the commission at the time this section goes into effect shall have not more than ninety days in which to apply for a certificate of service authority from the commission pursuant to this chapter unless a company holds a state charter issued in or prior to the year 1913 which charter authorizes a company to engage in the telephone business. No telecommunications company not exempt from this subsection shall transact any business in this state until it shall have obtained a certificate of service authority from the commission pursuant to the provisions of this chapter, except that any telecommunications company which is providing telecommunications service on September 28, 1987, and which has not been granted or denied a certificate of public convenience and necessity prior to September 28, 1987, may continue to provide that service exempt from all other requirements of this chapter until a certificate of service authority is granted or denied by the commission so long as the telecommunications company applies for a certificate of service authority within ninety days from September 28, 1987.

2. No telecommunications company offering or providing, or seeking to offer or provide, any interexchange telecommunications service shall do so until it has applied for and received a certificate of interexchange service authority pursuant to the provisions of subsection 1 of this section. No telecommunications company offering or providing, or seeking to offer or provide, any local exchange telecommunications

service shall do so until it has applied for and received a certificate of local exchange service authority pursuant to the provisions of section 392.420.

3. No certificate of service authority issued by the commission shall be construed as granting a monopoly or exclusive privilege, immunity or franchise. The issuance of a certificate of service authority to any telecommunications company shall not preclude the commission from issuing additional certificates of service authority to another telecommunications company providing the same or equivalent service or serving the same geographical area or customers as any previously certified company, except to the extent otherwise provided by section 392.450.

4. Any certificate of public convenience and necessity granted by the commission to a telecommunications company prior to September 28, 1987, shall remain in full force and effect unless modified by the commission, and such companies need not apply for a certificate of service authority in order to continue offering or providing service to the extent authorized in such certificate of public convenience and necessity. Any such carrier, however, prior to substantially altering the nature or scope of services provided under a certificate of public convenience and necessity, or adding or expanding services beyond the authority contained in such certificate, shall apply for a certificate of service authority for such alterations or additions pursuant to the provisions of this section.

5. The commission may review and modify the terms of any certificate of public convenience and necessity issued to a telecommunications company prior to September 28, 1987, in order to ensure its conformity with the requirements and policies of this chapter. Any certificate of service authority may be altered or modified by the commission after notice and hearing, upon its own motion or upon application of the person or company affected. Unless exercised within a period of one year from the issuance thereof, authority

conferred by a certificate of service authority or a certificate of public convenience and necessity shall be null and void.

6. The commission may issue a temporary certificate which shall remain in force not to exceed one year to assure maintenance of adequate service or to serve particular customers, without notice and hearing, pending the determination of an application for a certificate.

7. No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing to telecommunications providers, within the geographic area in which it lawfully operates as a municipal utility, telecommunications services or telecommunications facilities on a nondiscriminatory, competitively neutral basis, and at a price which covers cost, including imputed costs that the political subdivision would incur if it were a for-profit business. Nothing in this subsection shall restrict a political subdivision from providing telecommunications services or facilities:

(1) For its own use;

(2) For 911, E-911 or other emergency services;

(3) For medical or educational purposes;

(4) To students by an educational institution; or

(5) Internet-type services.

The provisions of this subsection shall expire on August 28, 2007.

8. The public service commission shall annually study the economic impact of the provisions of this section and prepare

and submit a report to the general assembly by December thirty-first of each year.

(L.1987, H.B. No. 360, § A; Amended by L.1996, S.B. No. 507, § A; L.1997, H.B. No. 620, § A; L.2002, H.B. No. 1402, § A)

Missouri Revised Statutes § 392.410 (2001)

Certificate of public convenience and necessity required, exception – certificate of interexchange service authority, required when – duration of certificates – temporary certificates, issued when.

392.410. 1. A telecommunications company not possessing a certificate of public convenience and necessity from the commission at the time this section goes into effect shall have not more than ninety days in which to apply for a certificate of service authority from the commission pursuant to this chapter unless a company holds a state charter issued in or prior to the year 1913 which charter authorizes a company to engage in the telephone business. No telecommunications company not exempt from this subsection shall transact any business in this state until it shall have obtained a certificate of service authority from the commission pursuant to the provisions of this chapter, except that any telecommunications company which is providing telecommunications service on September 28, 1987, and which has not been granted or denied a certificate of public convenience and necessity prior to September 28, 1987, may continue to provide that service exempt from all other requirements of this chapter until a certificate of service authority is granted or denied by the commission so long as the telecommunications company applies for a certificate of service authority within ninety days from September 28, 1987.

2. No telecommunications company offering or providing, or seeking to offer or provide, any interexchange telecommunications service shall do so until it has applied for and received a certificate of interexchange service authority pursuant to the provisions of subsection 1 of this section. No telecommunications company offering or providing, or seeking to offer or provide, any local exchange telecommunications service shall do so until it has applied for and received a

certificate of local exchange service authority pursuant to the provisions of section 392.420.

3. No certificate of service authority issued by the commission shall be construed as granting a monopoly or exclusive privilege, immunity or franchise. The issuance of a certificate of service authority to any telecommunications company shall not preclude the commission from issuing additional certificates of service authority to another telecommunications company providing the same or equivalent service or serving the same geographical area or customers as any previously certified company, except to the extent otherwise provided by section 392.450.

4. Any certificate of public convenience and necessity granted by the commission to a telecommunications company prior to September 28, 1987, shall remain in full force and effect unless modified by the commission, and such companies need not apply for a certificate of service authority in order to continue offering or providing service to the extent authorized in such certificate of public convenience and necessity. Any such carrier, however, prior to substantially altering the nature or scope of services provided under a certificate of public convenience and necessity, or adding or expanding services beyond the authority contained in such certificate, shall apply for a certificate of service authority for such alterations or additions pursuant to the provisions of this section.

5. The commission may review and modify the terms of any certificate of public convenience and necessity issued to a telecommunications company prior to September 28, 1987, in order to ensure its conformity with the requirements and policies of this chapter. Any certificate of service authority may be altered or modified by the commission after notice and hearing, upon its own motion or upon application of the person or company affected. Unless exercised within a period of one year from the issuance thereof, authority con-

ferred by a certificate of service authority or a certificate of public convenience and necessity shall be null and void.

6. The commission may issue a temporary certificate which shall remain in force not to exceed one year to assure maintenance of adequate service or to serve particular customers, without notice and hearing, pending the determination of an application for a certificate.

7. No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities:

(1) For its own use;

(2) For 911, E-911 or other emergency services;

(3) For medical or educational purposes;

(4) To students by an educational institution; or

(5) Internet-type services.

The provisions of this subsection shall expire on August 28, 2002.

(L.1987, H.B. No. 360, § A; Amended by L.1996, S.B. No. 507, § A; L.1997, H.B. No. 620, § A)